

"The Rich Man's Eight Track": MP3 Files, Copyright Infringement, and Fair Use

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NOTE

“The Rich Man’s Eight Track”:¹ MP3 Files, Copyright Infringement, and Fair Use

“When, in five years, this remarkable achievement in the advancement of fidelity is obsolete and unplayable on any ‘modern’ equipment, remember: in 1971, the 8-Track tape was the state of the art.”²

I. INTRODUCTION

Over the years, the physical embodiment of sound recordings has evolved from vinyl records, to eight track tapes, to cassette tapes, to the compact disc (CD). This development of different media through which one can listen to music has resulted in improvements in the sound quality produced by the device and increased convenience for the consumer. In the last fifteen years, the CD has gained popularity due to its superior durability and sound quality. Enter the Internet and MP3 technology.³ MP3 technology has become the next generation in the ever-evolving line of listening media because the advent of MP3 files allows users to listen to or make copies of songs from the Internet that maintain the sound quality of CDs.

This piece explores MP3 technology as it relates to copyright infringement and the doctrine of fair use. After an explanation of the rationale underlying copyright law in Part II, Part III provides an overview of MP3 technology and the piracy of MP3 files that has resulted. Part III also examines two popular websites, MP3.com⁴ and Napster.com,⁵ and evaluates whether the services provided by each site constitute copyright infringement. Part IV examines file sharing software and applies the doctrine of fair use to the services offered by MP3.com and Napster. Part V addresses potential

1. BIG BLACK, THE RICH MAN’S EIGHT TRACK TAPE (Touch and Go Records 1987), at <http://www.southern.com/southern/band/BIGBL/disc.html>.

2. *Id.*

3. A comprehensive overview of MP3 technology is set forth in Part III. For a detailed primer of MP3 technology see MP3 Now, MP3 Info, Two Easy Steps to listen to an MP3!, at http://www.mp3now.com/html/mp3_info.html (last visited Sept. 10, 2000); MP3 Now, MP3 Info, Technical Details, at http://www.mp3now.com/html/technical_details.html (last visited Sept. 10, 2000); Brad Kimmel, *Distributing Music Over the Internet*, at <http://www.duke.edu/~bdk3/mp3.html> (comparing MP3 format to that of Digital Audio Tapes, RealAudio, and .WAV [sic]).

4. MP3.com, Inc. [hereinafter MP3.com], at <http://www.mp3.com>. MP3.com offers two services; Beam-it and Instant Listening, both examined in this piece.

5. Napster, Inc. [hereinafter Napster], at <http://www.napster.com>.

consequences of the implementation of regulatory technology and notes that strict regulation of MP3 files via technological protection measures may choke the objectives of copyright law. Part VI reiterates that the flexibility of the current copyright law remains an effective means to evaluate the rights of copyright holders.

II. THE RATIONALE UNDERLYING COPYRIGHT LAW

The objective of copyright law is to promote creativity and the dissemination of ideas by granting artists, writers, and other creators of artistic works a "limited monopoly" in their works.⁶ Section 102 of the Copyright Act of 1976 protects works that are "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁷ Thus, copyright protection attaches immediately upon fixation.⁸ The underlying philosophy of American copyright law aims to benefit society through the creation and dissemination of artistic works because there is a prevailing belief that "artists" will create more works if they are assured that their works will be protected from infringement. Furthermore, the "limited monopoly"⁹ protected under section 106 of the Copyright Act¹⁰ serves to satisfy constitutional objectives by "promot[ing] the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹¹

6. See SHELDON W. HALPERN, ET AL., FUNDAMENTALS OF UNITED STATES INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENT, AND TRADEMARK 1 (1999) (emphasis omitted).

7. 17 U.S.C. § 102 (1994).

Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Id.

8. For example, a band obtains copyright protection of a song as soon as the songs are recorded. Unlike patent and trademark law, formal filing is not required to obtain copyright protection. In the present example, copyright protection attaches immediately because the songs are deemed to be "fixed" as soon as they are recorded.

9. See HALPERN, *supra* note 6, at 1 (emphasis omitted).

10. See 17 U.S.C. § 106 (1994 & Supp. V 1999).

11. U.S. CONST. art. I, § 8, cl. 8.

III. MP3 TECHNOLOGY AND THE PROBLEM OF PIRACY

MP3, an acronym for Moving Picture Expert Group Audio Layer 3,¹² files consist of a “digital audio compression algorithm [which] . . . makes an audio file ‘smaller’ by a factor of twelve to one without significantly reducing sound quality.”¹³ An MP3 file can be obtained by visiting a website such as MP3.com or Napster, and selecting a file. An MP3 file may either be listened to by “streaming,” or may be “downloaded,” by saving it to a hard drive.¹⁴ A downloaded MP3 file may also be played through a portable MP3 player.¹⁵ Portable MP3 players constitute today’s version of the Walkman, but in a digitized format. The combination of a personal computer, Internet access, and MP3 technology provides unprecedented access to music.

One of the problems created by MP3 files is that the MP3 technology, coupled with the vast reach of the Internet, allows “millions of people to instantaneously access, reproduce and distribute copyrighted works in digitized form without authorization.”¹⁶ The concern, according to the Recording Industry Association of America (RIAA), is that “Internet distribution of serial digital copies of pirated copyrighted material will discourage the purchase of legitimate recordings”¹⁷ At present, for example, users can obtain numerous MP3 files free of charge from a myriad of websites; legitimate or otherwise.¹⁸ At these sites, MP3 music files, most of which are protected by copyright law, can be downloaded or streamed. Of

12. See Fred McKissack, *Revenge of the Indies; MP3 Will Democratize Music Industry*, 63 THE PROGRESSIVE 39 (May 1, 1999).

13. RIAA v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1074, 51 U.S.P.Q.2d (BNA) 1115, 1117 (9th Cir. 1999). Currently, MP4 technology, consisting of improvements upon MP3 technology, is in development. For a detailed explanation of MP4 technology, see Machine Listening Group, *MPEG-4 Structured Audio (MP4 Structured Audio)*, at <http://sound.media.mit.edu/mpeg4>.

14. “[S]treaming audio allows a user to listen to a music file as it downloads, instead of having to download the entire file and then listen to it.” Kimmel, *supra* note 3. Downloading is the process by which data is transferred “from a usually large computer to the memory of another device.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, available at <http://www.m-w.com/dictionary.htm>.

15. Portable players “can receive copies of audio files from a computer’s hard drive and store approximately sixty minutes of music internally. A removable memory card can also be purchased which effectively doubles the playback capability of the [MP3 player].” Kevin Davis, Comment, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 U.S.F. L. REV. 129, 160 (1999).

16. Robert G. Gibbons & Lisa M. Ferri, *The Legal War Against Cyberspace Privacy*, N.Y.L.J., Aug. 5, 1999, at 1.

17. *Diamond*, 180 F.3d at 1074, 51 U.S.P.Q.2d (BNA) at 1117.

18. See, e.g., Audiofind, at <http://www.audiofind.com>; Napster, Inc., at <http://www.Napster.com>; MP3 Fiend, at <http://www.mp3fiend.com>; The Insane Violinist’s Classical MP3 Archives, at <http://classicalmp3.dhs.org/>; Freenet, at <http://www.freenet.com>; Gnutella, at <http://gnutella.wego.com>; Scour Exchange, at <http://www.scour.com>.

primary concern to RIAA is that websites that offer MP3 files *without the permission of the copyright holder* will eliminate the need for customers to purchase music from the record industry.¹⁹ The ease of accessibility and possibility of economic harm has led to the struggle between the providers and users of MP3 files, and the artists and record companies who may suffer from the proliferation of MP3 technology.²⁰

A. MP3.com

MP3.com's two primary services, Beam-it and Instant Listening, have produced a significant amount of litigation.²¹ The record industry alleged that MP3.com permitted access to the copyrighted works of thousands of artists—many of whom assigned their copyrights to the record companies—which resulted in copyright infringement.²² The catalyst for this suit was a service

19. See *Diamond*, 180 F.3d at 1074, 51 U.S.P.Q.2d (BNA) at 1117. Not to be overlooked is the significance of MP3 technology's impact on independent, small, or unknown bands, labels, and musicians. Generally, prior to MP3 technology, lesser known and independent musicians had difficulty obtaining exposure. The Internet, and MP3 technology in particular, have allowed musicians around the world to make their craft available to anyone with Internet access. Though producing music in MP3 format does not bring overnight success to most artists, MP3 technology potentially enables artists and labels to disseminate their music to a broader segment of the population than would otherwise be possible. See, e.g., D.A.M. CD Program, at <http://www.mp3.com/artistcommunity/newartist> (last visited Jan. 22, 2001) (offering musicians free distribution of recordings). Examples of independent musicians who have made MP3 files of their music available can be found at <http://www.johnnyphilko.com> and <http://www.resonantpress.com>.

20. See, e.g., *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 54 U.S.P.Q.2d (BNA) 1668 (S.D.N.Y. 2000) (recording industry sued MP3.com for providing access to works owned by record companies); *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 55 U.S.P.Q.2d (BNA) 1780 (N.D. Cal. 2000) (recording industry sued Napster for providing access to industry-owned works), *aff'd*, 239 F.3d 1004, 57 U.S.P.Q.2d (BNA) 1729 (9th Cir. 2001).

21. See *UMG*, 92 F. Supp. 2d 349, 54 U.S.P.Q.2d (BNA) 1668. According to RIAA, to provide their services, MP3.com "copied every track from 45,000 commercial audio CDs onto its computer servers." Complaint for Copyright Infringement at ¶ 26, *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 54 U.S.P.Q.2d (BNA) 1668 (S.D.N.Y. 2000) (No. 00 Civ. 0472 (JSR)). See also, Letter From Hillary Rosen, President and CEO, Recording Industry Association of America, to Michael Robertson, CEO, MP3.com, Inc. (Jan. 21, 2000), at <http://www.riaa.com/piracy/press/012100.htm> (last visited Jan. 21, 2000).

22. See Complaint for Copyright Infringement at ¶ 1, *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 54 U.S.P.Q.2d (BNA) 1668 (S.D.N.Y. 2000) (No. 00 Civ. 0472 (JSR)). MP3.com has settled and entered into license agreements with Sony Music Entertainment, Inc., Warner Music Group, BMG Music, and EMI Music. The agreements enable MP3.com to use certain recordings from each organization in connection with MP3.com's My.MP3.com service. See Press Release, MP3.com, MP3.com and Sony Music Entertainment Settle Copyright Infringement Suit (Aug. 21, 2000), available at <http://pr.mp3.com/pr/158.html>; Press Release, MP3.com, MP3.com Settles Copyright Infringement Suit with Warner Music Group (June 9, 2000), available at <http://pr.mp3.com/pr/111.html>; Press Release, MP3.com, MP3.com and BMG Entertainment Settle Copyright Infringement Suit (June 9, 2000), available at <http://pr.mp3.com/pr/110.html>; Press Release, MP3.com, EMI and MP3.com Settle Copyright Infringement Suit (July 28, 2000), available

offered by MP3.com called My.MP3.com. My.MP3.com offered two new technologies; Beam-it and Instant Listening.²³

Beam-it and Instant Listening have several things in common; first, MP3 files may not be downloaded until MP3.com has verification that the user already owns a physical copy of the music to be obtained from MP3.com. Second, upon verification of ownership, MP3.com "beams" the requested tracks into the user's account.²⁴ Third, a password-protected account is accessible through the Internet.²⁵ "All accounts are password-protected, so the music in one account is not available to another account."²⁶ Additionally, "if [MP3.com] detect[s] multiple users on the same account, [MP3.com] can terminate the users of that account entirely."²⁷ Potentially, an individual can place their entire music library into an MP3.com account so that it may be accessed from any location via the Internet.²⁸

Although the two services are very similar, unlike Beam-it, Instant Listening users must purchase music in CD format from an online retailer ("e-tailer") affiliated with MP3.com.²⁹ After purchasing a CD, the e-tailer

at <http://pr.mp3.com/pr/143.html>. Although MP3.com was able to enter into numerous settlement agreements, Universal Music Group was "awarded \$53.4 million in statutory damages and attorneys fees . . . in its copyright infringement suit against MP3.com, Inc." Press Release, MP3.com, Court Awards Judgment to Universal Music Group in Copyright Infringement Suit with MP3.com (Nov. 14, 2000), available at <http://pr.mp3.com/pr/217.html>. MP3.com was subsequently granted a non-exclusive license to use Universal-controlled works in connection with the My.MP3.com service. See *id.* See also MP3.com Vaults Ahead in Efforts to Restore Your Music, at <http://progress.mp3.com> (last visited Aug. 28, 2000) (explaining to users that not all music originally available had been restored for use). The effect of these settlements is that MP3.com users can still place music into their My.MP3.com accounts; however, MP3.com users may not be able to listen to the music until MP3.com has "resolved the other issues related to our ongoing negotiations with other parties." *Id.*

23. See MP3.com, My.MP3.com Help, Guided Tour of Features, at <http://help.mp3.com/help/mymp3/tutorial/page2.html> (providing a description of how Beam-it and Instant Listening work); see also Press Release, MP3.com, MP3.com Brings Full Support to Linux With Beam-it Software, (Feb. 3, 2000), at <http://www.mp3.com/pr/000203beamit.html> (last visited Feb. 7, 2000) (noting that both Beam-it and Instant Listening are available for use with Linux).

24. "Beaming" is simply the process by which MP3.com transfers an MP3 file to a user's My.MP2.com account. See MP3.com, Instructions for Using Beam-it, at http://www.mp3.com/my/beamit/download/using_beamit.html (last visited Sept. 10, 2000).

25. See E-mail from MP3.com, Inc., Customer Service, to Kathryn I. Mullen, (Mar. 15, 2000) (on file with Marquette Intellectual Property Law Review).

26. MP3.com, My.MP3.com Q&A, at <http://bboard.mp3.com/mp3/ubb/Forum8/HTML/000050.html>.

27. *Id.*

28. See E-mail from MP3.com, Inc., Customer Service, to Kathryn I. Mullen, (Mar. 15, 2000) (on file with Marquette Intellectual Property Law Review) ("Now you have access to your collection anywhere on the web.").

29. E-tailers that cooperate with MP3.com include Junglejeff.com, Djangos.com, Duffelbag.com, and Cheap-CDs. See <http://www.mp3.com/mymp3/instantlistening/partners.html>.

contacts MP3.com and verifies to MP3.com that the purchaser owns the CD.³⁰ The idea is to allow the CD purchaser to listen to the purchased music immediately, rather than waiting for delivery of the CD.³¹

Unlike Instant Listening, Beam-it does not offer independent verification of CD ownership.³² The absence of e-tailer verification requires the user to verify ownership of the CD with MP3.com directly. MP3.com verifies the ownership of the CD and transfers the contents of the CD into the purchaser's My.MP3.com account.³³ Beam-it functions as follows:

Users simply place a CD in a computer, and after Beam-it[] verifies the CD, its tracks are made accessible via the user's My.MP3.com account. Beam-it[] uses a proprietary verification and security process that lets consumers play their CDs anywhere using My.MP3.com via listen-only audio streaming.³⁴

The Recording Industry adamantly opposed Beam-it because the "*the user does not and cannot copy his or her own CD onto the My.MP3 computer servers.*"³⁵ Thus, Beam-it only requires ownership of the CD to permit access to the music therein. The problem lies in the possibility that users may falsely claim ownership to a CD, thereby gaining access to copyrighted musical works without having purchased a CD. In response to this concern, MP3.com noted that

If people are passing around borrowed CDs that have not been purchased, they can copy them in many ways (cassette, CD-R, RealJukebox, etc.). . . . [O]ur terms of use require consumers of our service to represent to us that they own the CD and that it has not been copied or borrowed. Unfortunately, . . . CDs can't be uniquely identified as "John's CD."³⁶

Essentially, MP3.com depends upon the "honor system" for their Beam-it

30. See generally E-mail from MP3.com, Inc., Customer Service, to Kathryn I. Mullen, (Mar. 15, 2000) (on file with Marquette Intellectual Property Law Review) ("The instant [sic] listening [sic] partner automatically confirms the purchase of the CD.").

31. See MP3.com, My.MP3.com Help, Guided Tour of Features, at <http://help.mp3.com/help/mymp3/tutorial/page2.html> ("Instant Listening lets you listen to and enjoy your online CD purchases before they arrive in the mail.") (emphasis and punctuation omitted).

32. See E-mail from MP3.com, Inc., Customer Service, to Kathryn I. Mullen, Mullen, (Mar. 15, 2000) (on file with Marquette Intellectual Property Law Review). "The Beam-it process works as a verifier to see if you have possession of the CD." *Id.*

33. See *id.*

34. Press Release, MP3.com, MP3.com Brings Full Support to Linux With Beam-it Software, (Feb. 3, 2000), at <http://www.mp3.com/pr/000203beamit.html> (last visited Feb. 7, 2000).

35. Complaint for Copyright Infringement at ¶ 28, UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 54 U.S.P.Q.2d (BNA) 1668 (S.D.N.Y. 2000) (No. 00 Civ. 0472 (JSR)) (emphasis added).

36. MP3.com, My.MP3.com Q&A, at <http://bboard.mp3.com/mp3/ubb/Forum8/HTML/000050.html>.

service as there is no fail-safe way for MP3.com to police Beam-it users in pursuit of potential infringers.

*B. Napster*³⁷

Napster differs from the two MP3.com services in that Napster allows MP3 files to be shared between users. Specifically, Napster provides a means by which users can download MP3 files from a collection of MP3 files stored on the hard drives of other Napster users.³⁸ After downloading Napster's free MusicShare software,³⁹ registered users can exchange MP3 files with other registered Napster users who are concurrently logged onto Napster.⁴⁰ Napster works in the following manner:

The software becomes fully functional after users register with Napster by selecting an account name, or "user name," and a password.

The software features a browser interface, search engine, and chat functions that operate in conjunction with [Napster's] online network of servers. The software also contains a "hotlist" tool that allows users to compile and store lists of other account holders' user names. In addition, the Napster software may be used to play and categorize audio files, which users can store in specific file directories on their hard drives. Those directories, which allow account holders to share files on Napster, constitute the "user library."⁴¹

Beam-it and Instant Listening users may access MP3 files from only one source—MP3.com—and are unable to permanently download the MP3 files. Conversely, Napster users have access to MP3 files from millions of other Napster users and may download MP3 files to a hard drive for unlimited future use. Additionally, an attractive feature of the downloaded MP3 is that the MP3 files may be "burned" or "ripped" onto a CD to create a customized arrangement of music.

C. MP3 Files and Copyright Infringement

According to section 102, the Copyright Act protects "original works of authorship fixed in any tangible medium of expression, *now known or later*

37. According to one reporter, "Napster's power stands as an indication of . . . the 'collapse of control.' Napster's controversial free music file-sharing service is among the fastest-growing Web sites [sic] ever." George A. Chidi, *Music, Book Industries to Lose Billions*, CNN.com (Sept. 21, 2000), at <http://www.cnn.com/2000/TECH/computing/09/21/music.book.loss.idg/index.html>.

38. See *A&M Records*, 114 F. Supp. 2d at 905–08, 55 U.S.P.Q.2d (BNA) at 1786–87.

39. See *id.* at 905, 55 U.S.P.Q.2d (BNA) at 1786.

40. See *id.* at 905–08, 55 U.S.P.Q.2d (BNA) at 1786–87.

41. *Id.* at 905, 55 U.S.P.Q.2d (BNA) at 1786.

developed, from which they can be perceived, reproduced, or otherwise communicated, *either directly or with the aid of a machine or device*.”⁴² Fixation occurs when the embodiment of a work “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁴³ It is important to note that “[t]he nature of th[e] medium is immaterial, so long as it is such that the work ‘can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device’”⁴⁴

Section 501 of the Copyright Act⁴⁵ prescribes that a copyright is infringed when any of the copyright holder’s exclusive rights, as set forth in section 106,⁴⁶ are violated. Two of the most important exclusive rights include the right to reproduce⁴⁷ and the right to distribute the copyrighted work.⁴⁸ After determining that MP3 files are protected by the Copyright Act, the actions of MP3.com and Napster must be examined to determine whether the downloading or streaming of MP3 files, as permissible through MP3.com and Napster, infringed copyright law.⁴⁹

42. 17 U.S.C. § 102(a) (1994) (emphasis added).

43. 17 U.S.C. § 101 (Supp. V 1999). *See also* HALPERN, *supra* note 6, at 41.

44. HALPERN, *supra* note 6, at 41.

45. 17 U.S.C. § 501(a) provides:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 121, or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be.

17 U.S.C. § 501(a) (Supp. V 1999).

46. According to 17 U.S.C. § 106:

Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (1994 & Supp. V 1999).

47. *See* 17 U.S.C. § 106(1) (1994).

48. *See* 17 U.S.C. § 106(3) (1994).

49. “In addition to the remedies available to the copyright owner in a civil action, . . . the Government may subject the defendant to criminal penalties.” CRAIG JOYCE ET AL., COPYRIGHT LAW 846 (4th ed. 1998). Infringement is willful where it occurs “(1) for purposes of commercial advantage or private financial gain, or (2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted

1. Instant Listening

As previously discussed, copyright protection is conferred upon fixation which dictates that copyrighted music converted to MP3 files is necessarily protected under copyright law.⁵⁰ Even though an MP3 file that is downloaded or streamed is capable of being “perceived”⁵¹ and “reproduced,”⁵² it is unclear why a copyright holder’s exclusive reproduction and distribution rights are violated by MP3.com’s Instant Listening service. First, the user has purchased the CD from an Instant Listening partner who is able to verify, with a high degree of certainty, ownership of the CD. Second, Instant Listening is only intended for personal use—every user must have a password to retrieve songs from their My.MP3.com account. MP3.com’s only role is to transfer the contents of the CD to the user’s My.Mp3.com account. To that end, MP3.com acts only to provide free online storage, in a digitized form, of an individual’s music library.

Consider also, that by selling a CD the copyright holder is exercising their exclusive right to reproduce and distribute copies and thereby necessarily acquiescing to the fact that the purchaser is buying the CD for the purpose of listening to it. As the Copyright Act does not limit sound recordings to specific media, so long as the CD is purchased, the copyright holder is compensated for the right to listen to the contents of the CD. Thus, the Instant Listening service does not appear to violate any of the copyright holder’s exclusive rights under section 106. Instant Listening merely allows music to be listened to through a new listening medium.

2. Beam-it⁵³

The majority of the MP3 files MP3.com made available for Beam-it users were protected by RIAA controlled-copyrights at the time the files were provided through the Beam-it service.⁵⁴ Therefore, an inquiry must be

works, which have a total retail value of more than \$1,000” 17 U.S.C. § 506(a) (Supp. V 1999). “These penalties apply to direct infringers, and also to those who aid or abet copyright infringement.” JOYCE, *supra*. “[W]illful infringement can be a crime even when undertaken without a profit motive on the infringer’s part.” *Id.*

50. See generally HALPERN, *supra* note 6, at 41. “Registration, while not mandatory for the attachment of copyright to a work, is a prerequisite to the institution of actions for infringement” *Id.* at 45.

51. See 17 U.S.C. § 106(1).

52. See 17 U.S.C. § 106(3).

53. Beam-it is examined as it originally functioned—by allowing unrestricted access to music to alleged owners of the CD. As previously related, settlements entered into by MP3.com have reduced the number of MP3 files available through Beam-it. See *supra* note 22.

54. Although the works were deemed to be fixed because they existed on CD prior to being downloaded, RIAA members owned most of the copyrights to the works.

undertaken as to whether, in accordance with section 501 of the Copyright Act, Beam-it violated the copyright holder's exclusive rights under section 106.

As with Instant Listening, two subsections of section 106 are relevant to determine whether Beam-it infringes a copyright holder's exclusive rights. However, the factor that distinguishes Beam-it from Instant Listening, and consequently renders the Beam-it process an infringement of copyright, is the fact that the Instant Listening users access MP3 files contained on a purchased CD, whereas Beam-it users may not own the music they seek to stream.

MP3.com, through the Beam-it service, has violated copyright law by reproducing and distributing copyrighted works because MP3.com offers the copyrighted works for Beam-it users to stream. Similar to Instant Listening, MP3 files are copied to MP3.com's servers and then released to users upon satisfaction of Beam-it's verification process. The problem, as discussed earlier, is that the Beam-it verification process is unreliable. For example, MP3.com, through its Instant Listening partners, can verify ownership because the recordings are purchased online. However, there is no e-tailer or third party through which ownership of a CD can be verified for Beam-it users.

Of course, one could make the same argument for Beam-it that was made for Instant Listening: the original purchase of the CD compensated the copyright holder. However, substantiation difficulty lingers as it is easy for a Beam-it user to falsify the verification process to obtain MP3 files. Beam-it is therefore unable to determine with any degree of accuracy whether a user actually owns the requested music of an MP3 file.⁵⁵ By providing access to thousands of CDs, it is conceivable that Beam-it allows a significant numbers of users to borrow a CD and falsely allege ownership to gain permanent access to the contents of an entire CD at no cost. Absent the permission of the copyright holder to reproduce and distribute recordings, Beam-it, through its reproduction and distribution of songs to potentially non-purchasing users, infringes the exclusive rights of the copyright holder under section 106 of the Copyright Act.

IV. FILE SHARING SOFTWARE

Napster's software facilitates the exchange of protected works as it allows MP3 files to be downloaded.⁵⁶ First, because copyright protection attaches

55. See Complaint for Copyright Infringement at ¶ 26, *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 54 U.S.P.Q.2d (BNA) 1668 (S.D.N.Y. 2000) (No. 00 Civ. 0472 (JSR)).

56. See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 905-08, 55 U.S.P.Q.2d (BNA) 1780, 1786-87 (N.D. Cal. 2000).

upon fixation, all MP3 files available through Napster are protected by copyright.⁵⁷ “Sharing” or “swapping” MP3 music files violates the rights of the copyright holder and constitutes copyright infringement under section 501.⁵⁸ The copyright owner’s exclusive right to distribute⁵⁹ and reproduce⁶⁰ their work is violated because Napster’s software allows users to reproduce and distribute protected musical works in MP3 file format. The Ninth Circuit ordered Napster to “make a substantial effort to identify the infringing files” in an attempt to curb infringement after recognizing that Napster’s software facilitated the copying and distribution of music protected under copyright law.⁶¹

A. The Audio Home Recording Act

One of the affirmative defenses raised by Napster was that of the Audio Home Recording Act (AHRA).⁶² The AHRA was designed to prevent the widespread creation of multi-generational digital copies of music.⁶³ The

57. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013–1014, 57 U.S.P.Q.2d (BNA) 1729, 1733–34 (9th Cir. 2001) (noting that the district court observed that the record industry controlled perhaps in excess of 70% of the works on Napster).

58. See generally 17 U.S.C. § 501 (1994 & Supp. V 1999).

59. See 17 U.S.C. § 106(3).

60. See 17 U.S.C. § 106(1).

61. *A&M Records v. Napster, Inc.*, No. C99-05183 MHP, 2001 U.S. Dist. LEXIS 2186, at *2 (N.D. Cal. Mar. 5, 2001) (ordering Napster to cooperate with record industry to police Napster’s database and halt access to copyrighted works controlled by the recording industry). The copyright holder must provide Napster with “the song title, the performer’s name, the file name (or reasonable variations) of the infringing work as posted on Napster, and a legal certification of copyright ownership.” John Borland, *Judge Lets Napster Live Despite Injunction*, CNET Networks, Inc. (Mar. 6, 2001), at http://news.cnet.com/news/0-1005-200-5039135.html?tag=tp_pr. Once in receipt of this information, Napster will have three days to stop the protected files from being shared. See *id.* The problem, however, is that there could be many different variations of file names for a single work. For example, while “Better to Do” may be blocked, “Better too Do” may not. If files such as the latter example are discovered, Napster has three days to block those files. See *id.* The success of these measures remains to be seen, but users have already managed to access protected works because of the variety of different spellings of file names. See CNN.com, *Canada Firm Uses Pig Latin to Fool Napster Block* (Mar. 12, 2001), at <http://www.cnn.com/2001/TECH/internet/03/12/napster.02/index.html>; CNN.com, *Napster Talking With Company That Tracks Titles* (Mar. 13, 2001), at <http://www.cnn.com/2001/TECH/internet/03/13/napster.ap/index.html>.

62. See *Napster*, 114 F. Supp. 2d at 909 n.19, 55 U.S.P.Q.2d (BNA) at 1794 n.19.

63. See JOYCE, *supra* note 49, at 552–54. One of the factors that motivated the enactment of the AHRA was the newly developed Digital Audio Tape (DAT). This format, popular in Japan, allowed multi-generational copies of music to be made without any perceivable loss in sound quality. At the time, this technology was not widely available in the United States. The American recording industry feared that if DAT technology were available, consumers would be less inclined to purchase retail music. Subsequently, the recording industry lobbied for legislation controlling digital reproduction of music while at the same time stalling consumer access to DAT technology by

statute targets "manufacturers and importers of electronic equipment[.]"⁶⁴ Under the AHRA, consumers who use digital equipment for purposes of "noncommercial home taping" are exempt from copyright infringement liability.⁶⁵

To date, examination of MP3 technology as it relates to the AHRA has been limited to the opinion in *RIAA v. Diamond Multimedia Systems, Inc.*⁶⁶ *Diamond* is inapplicable to the Napster litigation because the court principally examined MP3 players, not MP3 files. In *Diamond*, the Ninth Circuit considered whether a portable MP3 player constituted a digital device within the meaning of the AHRA.⁶⁷ RIAA maintained that portable MP3 players violated AHRA provisions because portable players do not employ Serial Copyright Management Systems (SCMS).⁶⁸ According to the Ninth Circuit, a device that utilizes SCMS technology "must be able to reproduce, either 'directly' or 'from a transmission,' a 'digital music recording.'"⁶⁹ Significantly, the court stated that a personal computer

. . . hard drive is a material object in which one or more programs are fixed; thus, *a hard drive is excluded from the definition of digital music recordings*. This provides confirmation that the [portable MP3 player] does not record "directly" from "digital music recordings," and therefore could not be a digital audio recording device unless it makes copies "from transmissions."⁷⁰

Based upon this analysis, the court found that the portable MP3 player was "not a digital audio recording device subject to the [SCMS] of the [AHRA]" because it was incapable of copying transmissions; instead, the portable player requires a hard drive to make copies.⁷¹ Thus, *Diamond* does

threatening manufacturers and importers of DAT equipment. *See id.* at 552. These actions are arguably responsible for the fact that, aside from recording studios and a small number of consumers, DAT technology has never gained popularity in the United States.

64. *Id.* at 553.

65. *See id.* at 554.

66. 180 F.3d 1072, 51 U.S.P.Q.2d (BNA) 1115 (1999).

67. *Id.* at 1073, 51 U.S.P.Q.2d (BNA) at 1116.

68. *See id.* at 1075, 51 U.S.P.Q.2d (BNA) at 1118 (SCMS "sends, receives, and acts upon information about the generation and copyright status of the files that it plays.").

69. *Id.* at 1076, 51 U.S.P.Q.2d (BNA) at 1118.

70. *Id.*, 51 U.S.P.Q.2d (BNA) at 1119 (emphasis added).

71. *Diamond*, 180 F.3d at 1081, 51 U.S.P.Q.2d (BNA) at 1122-23. Interestingly, the court reasoned that portable MP3 players are exempt from the provisions of the AHRA because

. . . any transmission reproduced indirectly must pass through a computer, as an MP3 file, to reach the [portable MP3 player]. As [previously noted] computers are exempted from the requirement of reading and transmitting SCMS codes, and MP3 files do not incorporate such codes. Thus, requiring the [portable player] to implement SCMS because it can indirectly reproduce a transmission of a digital music recording would be . . . "an exercise in futility." SCMS would not alter the [portable player's] ability to reproduce such

not provide Napster with a suitable defense because the Ninth Circuit holding that MP3 *players* are not within the ambit of the AHRA did not address whether MP3 *files* fall within the scope of the AHRA.

Although Beam-it and Napster infringe copyrights, services such as Instant Listening comply with copyright law as the exclusive rights of copyright holders are not violated. An individual should be able to download or stream music from an online account if ownership of the music is adequately proven. To that end, until MP3.com can develop an accurate method to identify true ownership of a CD, the best solution to Beam-it and Napster is to charge a nominal fee to users for each beamed, downloaded, or streamed MP3 file. The implementation of a fee-based service would eliminate the need for a verification process while potentially satisfying copyright holders.

B. Fair Use

The doctrine of fair use creates an exemption to the monopoly of exclusive rights maintained by the copyright holder.⁷² Specifically, fair use allows a copyrighted work to be used without the permission of the copyright holder in a way that would otherwise constitute infringement.⁷³ Considered an affirmative defense to copyright infringement,⁷⁴ the fair use doctrine is a judicially-created “safety valve, by means of which a court can find that, notwithstanding the absence of any specific exemption, the defendant’s use of the copyrighted material is such that, as a matter of policy, society gains most by a finding of non-infringement.”⁷⁵ Determination of fair use is made on a case-by-case basis.⁷⁶

Section 107 of the Copyright Act sets forth the framework for evaluating whether a fair use defense is applicable.⁷⁷ The preamble to section 107

transmissions, just as it would not alter the [portable player’s] ability to reproduce digital music recordings uploaded to a computer hard drive.

Id. at 1081 n.7, 51 U.S.P.Q.2d (BNA) at 1923 n.7 (internal citation omitted).

72. HALPERN, *supra* note 6, at 112.

73. *See id.* at 112–13.

74. *See* JOYCE, *supra* note 49, at 715.

75. HALPERN, *supra* note 6, at 113.

76. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 29 U.S.P.Q.2d (BNA) 1961, 1964–65 (1994).

77. 17 U.S.C. § 107 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and

provides examples of when a fair use defense may be successful.⁷⁸ The fair use factors “are interrelated and are not to be ‘treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.’”⁷⁹ In addition, all four factors are to be considered together, with no greater weight given to any one factor over the others.⁸⁰

The Supreme Court examined the relationship between the factors and noted that the first factor should focus on “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new”⁸¹ According to the Court, the second “factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”⁸² The Court noted that the third factor considers whether “‘the quantity and value of the materials used,’ are reasonable in relation to the purpose of the copying.”⁸³ The final factor focuses on the harm to the “market [for the original work] . . . caused by the particular actions of the alleged infringer”⁸⁴ The preamble and four statutory factors are to be considered together, with no greater weight given to any one factor.⁸⁵

If applicable, the fair use doctrine would provide Napster, MP3.com, and other online music providers with an affirmative defense to copyright infringement. As exact copies of the artists’ works are made, an analysis of

character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (1994).

78. *See id.* In *Campbell*, the Court explained that the examples in the preamble were “‘illustrative not limitative [sic],’” and were meant to “provide only general guidance about the sorts of copying that the courts and Congress most commonly had found to be fair uses.” 510 U.S. at 577, 29 U.S.P.Q.2d (BNA) at 1965.

79. HALPERN, *supra* note 6, at 120 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578, 29 U.S.P.Q.2d (BNA) 1961, 1965 (1994)).

80. *See Campbell*, 510 U.S. at 578, 29 U.S.P.Q.2d (BNA) at 1965.

81. *Id.* at 579, 29 U.S.P.Q.2d (BNA) at 1965 (internal citations omitted).

82. *Id.* at 586, 29 U.S.P.Q.2d (BNA) at 1968 (recognizing that elements of a copyrighted song subsequently used by another musician in a musical parody “[fell] within the core of the copyright’s protective purposes.”).

83. *Id.* at 586, 29 U.S.P.Q.2d (BNA) at 1968 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (1841) (internal citation omitted)).

84. *Campbell*, 510 U.S. at 590, 29 U.S.P.Q.2d (BNA) at 1970.

85. *See id.* at 578, 29 U.S.P.Q.2d (BNA) at 1965.

MP3 files turns on the fourth fair use factor; the economic impact of the use.⁸⁶

1. Beam-it

Beam-it does not fit within any of the illustrative examples of fair use in the preamble to section 107.⁸⁷ It would appear that “the purpose and character of the use” is to provide free access to copyrighted works.⁸⁸ Although MP3.com maintains that the access is not free because the user already owns the work in the form of a CD, the unreliable nature of the verification process allows access to works that a user may not own. The first factor favors the copyright holder.

The second factor, “the nature of the copyrighted work[,]”⁸⁹ also weighs in favor of the copyright holder. Copying an *entire* song is at “the core of intended copyright protection.”⁹⁰ Therefore, the greater the amount of the work copied, the less likely a fair use defense is to be successful.⁹¹ The function of Beam-it is to place exact copies of songs into the accounts of MP3.com’s Beam-it users. This activity offers free access to copyrighted works; an activity that favors the copyright holder in a fair use analysis.

The third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”⁹² favors the copyright holder as well. The amount of material used is an entire musical work. As the entire work is used, all substantial and valuable elements incorporated therein (theme, for example) are necessarily used.

The final factor turns on the economic outcome of free, unlimited access to MP3 files.⁹³ In *Napster*, the Ninth Circuit accepted the record industry’s contention that access to free MP3 music files is likely to reduce the number of CDs purchased.⁹⁴ The Ninth Circuit’s determination in *Napster* that free MP3 files economically harms the holder of a copyright can be easily applied to MP3.com or any other organization which promotes the exchange of MP3 files.

86. A fair use analysis need not be undertaken in connection with Instant Listening as the service does not constitute copyright infringement.

87. See generally 17 U.S.C. § 107.

88. See 17 U.S.C. § 107(1).

89. 17 U.S.C. § 107(2).

90. *Campbell*, 510 U.S. at 586, 29 U.S.P.Q.2d (BNA) at 1968.

91. See *id.*, 29 U.S.P.Q.2d (BNA) at 1968.

92. 17 U.S.C. § 107(3).

93. See 17 U.S.C. § 107(4) (“the effect of the use upon the potential market for or value of the copyrighted work.”).

94. See *Napster*, 239 F.3d at 1016–17, 57 U.S.P.Q.2d (BNA) at 1736–37.

2. Napster

Napster's attempt to rely on the fair use doctrine was destined to be rejected as a cursory review of the fair use factors indicates that all four factors favor the copyright holder.⁹⁵ The record industry prevailed against Napster, in large part, because MP3 files are exact copies of the copyrighted works.⁹⁶ The MP3 files are not transformed in any way.⁹⁷

The second factor, "the nature of the copyrighted work,"⁹⁸ favors the copyright holder. The Supreme Court held that the greater the amount of the work copied, the closer to the core of copyright protection is violated.⁹⁹ Therefore, Napster had no chance of prevailing because Napster's software was designed to exchange exact copies of copyrighted works through MP3 files. Duplicated copyrighted material is undoubtedly at the core of works intended to be protected by the Copyright Act. Similarly, because the MP3 file is an exact copy of the protected work, the third fair use factor favors the copyright holder because downloading an entire musical work necessarily encompasses all portions that might be considered substantial.¹⁰⁰

The fourth and final factor of the fair use doctrine became paramount to Napster after the record industry prevailed on the first three factors.¹⁰¹ However, despite Napster's attempt to persuade the Ninth Circuit that file sharing did not harm record sales, predictions and studies presented by the record industry indicated that online file sharing has led to a significant decline in record sales.¹⁰² One study estimated that "record labels will lose \$3.1 billion and book publishers \$1.5 billion by 2005 because of file sharing."¹⁰³ Another study centered around college campuses and "examined

95. See *id.* at 1014–157, 57 U.S.P.Q.2d (BNA) at 1734.

96. See *id.* at 1015, 57 U.S.P.Q.2d (BNA) at 1734–35 (reiterating that MP3 files are not transformed merely by being downloaded).

97. Even conversion of an MP3 file from MP3 format to another format does not transform the work. Though the file format may be converted, the construction of the song itself does not change, save for a loss in sound quality so minute that it is imperceptible to the human ear.

98. 17 U.S.C. § 107(2).

99. See *Campbell*, 510 U.S. at 586, 29 U.S.P.Q.2d (BNA) at 1968. The *Campbell* Court noted previous fair use cases that turned on a comparison of a "fictional short story with factual works," a "soon-to-be-published memoir with a published speech," "motion pictures with news broadcasts," and "creative works with bare factual compilations." *Id.* (citations omitted). Despite these illustrations, an exact copy of a musical work is at the core of copyright protection.

100. See 17 U.S.C. § 107(3).

101. See 17 U.S.C. § 107(4) ("the effect of the use upon the potential market for or value of the copyrighted work.").

102. See *Napster*, 239 F.3d at 1016–17, 57 U.S.P.Q.2d (BNA) at 1736–37 (relying on the expert testimony presented to the district court that file sharing harms record sales as long as Napster continues to operate).

103. Chidi, *supra* note 37. Estimates have been as high as 2.7 billion MP3 files trading

sales for stores around a selected set of sixty-seven colleges where anecdotal evidence suggest[ed] a high degree of Napster usage.”¹⁰⁴ The same study concluded that swapping MP3 files was to blame “for a steady two-year decline of college market album sales.”¹⁰⁵ The results of the study indicated that

. . . while overall retail sales steadily increased between January 1997 and March 2000, album sales in more than 9,000 SoundScan reporting retail stores within a 5-mile radius of more than 3,000 colleges declined by 4% over the last two years. Stores near the 67 schools that had banned Napster by late February showed a greater sales decline of 7% over the past two years.¹⁰⁶

In essence, the study found a decline in the sale of music in college stores, but an increase in national music sales.¹⁰⁷ Although record sales have increased throughout the country,¹⁰⁸ widespread file sharing through Napster is a relatively new practice and, consequently, long-term research remains unavailable. Furthermore, although Napster has undoubtedly impacted the record industry, a variety of factors affect music sales on college campuses.¹⁰⁹

A review of the studies presented by RIAA indicates that file sharing creates harmful effects on the market for CD sales. However, it is unclear what the long-term effect of file sharing will be. As a practical matter, it seems counterintuitive to believe that the availability of MP3 files will stimulate the demand for CDs. Most users, faced with the choice of paying for each CD they purchase or downloading unlimited MP3 files for free are likely to choose the latter. Arguably, at least a portion of the otherwise

through Napster per month. *See also* Borland, *supra* note 61.

104. Report, VNU Entertainment Marketing Solutions, *Measuring the Influence of Music File Sharing* (2000) [hereinafter VNU Report], available at http://www.reciprocal.com/pdf/reciprocal_VNU_report.pdf. “The analysis considered over 3,000 colleges and universities, and more than 9,000 stores. Stores were included in the analysis based on the following criteria: their locations were within five miles of any campus, and they have continuously reported music sales to SoundScan® since 1997.” *Id.*

105. Press Release, Reciprocal, Inc., *Reciprocal/VNU Entertainment Study Reveals Online File Sharing As Likely Cause Of Decline In College Market Album Sales* (May 24, 2000) [hereinafter Reciprocal Study], available at <http://www.reciprocal.com/prm%5Frel05242000.asp>. *See also* *Downloading Hurting Record Sales?* (May 26, 2000) [hereinafter *Hurting Sales*], available at <http://www.cnn.com/2000/fyi/news/05/25/sliding.sales.ap/>.

106. Reciprocal Study, *supra* note 105. *But see* Peter S. Fader & Wendy W. Moe, *MODELING HEDONIC PORTFOLIO PRODUCTS: A JOINT SEGMENTATION ANALYSIS OF MUSIC CD SALES* (Mar. 2000), available at <http://www.bus.utexas.edu/faculty/Wendy.Moe/Music.pdf>.

107. According to the study, “sales for all college stores and the selected college stores have been declining since [the first quarter of] 1998, while the national sales have been increasing during this time period.” Reciprocal Study, *supra* note 105.

108. *See* VNU Report, *supra* note 104.

109. *See Hurting Sales*, *supra* note 105.

downloaded or streamed music would be purchased if MP3 files were no longer available through the Internet. The clear presence of an adverse economic effect on the copyright holder weighed strongly against Napster in its bid to couch the fair use doctrine to its business practices.

Analysis of Beam-it and Napster confirms that a fair use defense will be unsuccessful when an entity distributes or facilitates the distribution of copyrighted works, regardless of whether the distribution is a result of insufficient policing mechanisms or by providing a means for millions of users to share their library of copyrighted works on a grand scale. Unfortunately, there is an absence of long-term market displacement studies of file sharing or copying practices. It is unlikely, however, that widespread access to free music would not, at least somewhat, adversely effect the market for, and value of, the copyrighted work. The problem for the record industry is the reality that "[e]ven if Napster dies in bankruptcy, music consumers will move to underground Internet services" ¹¹⁰

V. TECHNOLOGICAL PROTECTION MEASURES

The proliferation of file sharing websites has caused the record industry to combat these websites with technological protection measures (TPMs). One such TPM is digital watermarking.¹¹¹ Digital watermarking is "encryption technolog[y] . . . [designed to] substantiate ownership and prevent unauthorized copying."¹¹² Digital watermarking is designed to "imbed information within graphics and audio files that can be used to identify the owner's rights to these works."¹¹³ "When combined with new tracking services offered by some of the same companies that provide the watermarking technology, copyright owners can, in theory, find all illegal copies of their . . . music on the Internet and take appropriate legal action."¹¹⁴ Of course, for digital watermarking to be effective, websites must remain on the Internet long enough to be located by a tracking service.

In addition to marking files and tracking them over the Internet, copyright holders might also consider a product called the DigiBox. Rather than "tracking" copyright infringers, the DigiBox conditions file usage upon

110. Chidi, *supra* note 37. See, e.g., *supra* note 18.

111. Digital watermarking is also referred to as "fingerprinting." Doug Isenberg, *Digital Watermarks: New Tools for Copyright Owners and Webmasters*, WebReference.com (Jan. 26, 1998), at <http://www.webreference.com/content/watermarks/index.html>.

112. Gibbons & Ferri, *supra* note 16.

113. Isenberg, *supra* note 111.

114. *Id.* An example of a tracking service is "Digimarc's MarcSpider, [which] combs the web in search of images imbedded with digital watermarks, providing copyright owners with information on where their images appear (with or without permission) on the Internet." *Id.*

payment.¹¹⁵ The technology functions much like a jukebox, but in the context of music in digitized format. Specifically, a user encountering the DigiBox would be required to pay a fee before being able to access a file.¹¹⁶ In addition to conditioning access upon payment, the DigiBox benefits copyright holders in that “the DigiBox itself would pass to third parties with all usage controls intact.”¹¹⁷ In other words, the DigiBox could be used numerous times with several different users. The DigiBox thus assures copyright holders the royalties to which they are entitled while allowing the work to remain accessible to the public. For these reasons, the DigiBox, and similar technology, may be more effective in reducing copyright infringement through the Internet than digital watermarking.

While TPMs, such as the DigiBox, might reduce piracy through the use of MP3 files, TPMs may restrict society’s access to artistic works. If access is restricted, TPMs would be adverse to the objective of copyright protection—dissemination of works to “promote the Progress of Science and useful Arts.”¹¹⁸

Potentially, restrictive TPMs could eliminate the need for the doctrine of fair use. Therefore, care must be taken to ensure that the limited monopoly allowed the copyright holder under section 106 remains a limited monopoly, and does not expand through the overuse of TPMs by copyright owners.

VI. CONCLUSION

Personal computers, the Internet, and MP3 files have combined to form a new audio medium. This new medium does not affect traditional notions of copyright infringement or the doctrine of fair use. The Copyright Act is now, more than ever, appreciated as a flexible doctrine promulgated with the anticipation of new technologies that provides for the inevitable advances of society. The flexibility exhibited by the Copyright Act allows MP3 technology to be effectively analyzed in terms of infringement and fair use as

115. See Don E. Tomlinson & Timothy Nielander, *Unchained Melody: Music Licensing in the Digital Age*, 6 TEX. INTELL. PROP. L.J. 277, 313–14 (1998).

116. See InterTrust, InterTrust Technology (Mar. 19, 2001), at <http://www.intertrust.com/main/technology/index.html> (describing how the DigiBox functions when integrated with the InterTrust platform and the needs of an InterTrust client).

Information in a DigiBox container remains protected even after a user has accessed it, providing persistent protection of the information and continuing control over its use, regardless of where the information travels.

Content usage is managed by rules, including price, payment offer, play, view, print, copy, save, superdistribution [sic], and others.

Id.

117. Tomlinson & Nielander, *supra* note 115, at 314.

118. U.S. CONST. art. I, § 8, cl. 8.

successfully as other media of artistic, literary, and musical interpretation.

The primary concern regarding MP3 technology is the prevention of widespread piracy to ensure that artists continue producing works that society may benefit from. The regulation of MP3 files on the Internet must take care not to restrict access in a way that results in an expansion of the limited exclusive rights maintained by a copyright owner. The delicate balance must be maintained between protecting MP3 files and keeping works accessible to the public so as to further "Science and useful Arts."¹¹⁹ After all, "in 1971, the 8-Track Tape was the state of the art."¹²⁰

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119. *Id.*

120. BIG BLACK, *supra* note 1.